No. 17-1351

IN THE

United States Court of Appeals for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, Greenbelt Division
Civil Action No. TDC-17-0361
The Hon. Theodore D. Chuang, Presiding

BRIEF OF THE AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), and Fourth Circuit Local Rule 26.1, the American Jewish Committee ("AJC"), as *Amicus Curiae*, makes the following disclosures: (1) AJC is a non-profit organization; (2) AJC is not a publicly held corporation or other publicly held entity; (3) AJC does not have any parent corporations; (4) no publicly held corporation or other publicly held entity owns any portion of AJC; (5) AJC is not aware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation; and (6) this case does not arise out of a bankruptcy proceeding. The "Disclosure of Corporate Affiliations and Other Interests" form is attached to this brief.

Dated: Washington, D.C.
April 19, 2017

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

STATEMENT OF INTEREST

The American Jewish Committee ("AJC") is a non-profit international advocacy organization that aims to protect the civil and religious rights of American Jews and other minority populations throughout the world. AJC respectfully submits this brief as *Amicus Curiae* in support of the relief sought by Plaintiffs declaring invalid Section 2(c) of Executive Order No. 13,780 of March 6, 2017, entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States” (the “Second Executive Order” or the “Order”). Throughout history, Jewish communities have faced widespread persecution, discrimination, and improper resistance to their resettlement, including in the United States. AJC recognizes that immigrants and refugees today face similar discrimination and resistance. AJC has protected the civil and religious rights of Jewish Americans, immigrants, and refugees for over 100 years, with 26 offices and approximately 170,000 members and supporters nationwide.

AJC also advocates for an inclusive America that provides safe haven for all those fleeing persecution. AJC therefore promotes fair and just immigration policies for people of all races, religions, and national origins—consistent with its position that a strong, united America is vital for global freedom and security. AJC has worked with a variety of stakeholders to consistently advocate against actions that are inconsistent with American values. The Second Executive Order is such an action. AJC therefore asks this Court to uphold the injunction granted in favor of

Plaintiffs-Appellees enjoining enforcement of Section 2(c) of the Second Executive Order.[1,2]

SUMMARY OF ARGUMENT

Just like its prior iteration, the Second Executive Order lacks a sufficiently rational connection to the national security problems it purports to address. Indeed, the Second Executive Order is lacking in any bona fide or facially legitimate government purpose. The Second Executive Order is contrary to our nation's long history of rational Executive and Legislative action for the humanitarian protection of persecuted populations. Moreover, the Executive branch lacks sufficient authority to issue the Second Executive Order in the face of the express provisions of the Immigration and Nationality Act (the "INA"). Accordingly, the Second Executive Order should remain enjoined.

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[1] This brief was not authored in whole or in part by counsel for any party, nor has a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, nor has a person contributed money that was intended to fund preparing or submitting the brief. Out of an abundance of caution, AJC notes that attorneys with the undersigned counsel's law firm are counsel to the International Refugee Assistance Project ("IRAP") and have conducted limited background research on a pro bono basis for IRAP in this matter, but were not directly involved in the filing of the underlying district court proceedings. All parties have consented to the filing of this brief.

[2] Ishita Kala and John W. Akin of Linklaters LLP also contributed to the research and preparation of this brief, respectively.

PROCEDURAL HISTORY

On January 27, 2017, President Trump signed Executive Order No. 13,769, 82 Fed. Reg. 8977, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "First Executive Order"). The First Executive Order suspended entry for individuals travelling to the United States on immigrant and non-immigrant visas from seven majority-Muslim countries, Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen, for 90 days. The First Executive Order also barred entry to the United States for all refugees for 120 days; barred entry to the United States for Syrian refugees indefinitely; and prioritized refugee claims based on whether the individual is a religious minority in their country of nationality. In response to the First Executive Order, on February 3, 2017, the U.S. District Court for the Western District of Washington granted a nationwide temporary restraining order ("TRO"), prohibiting enforcement of the First Executive Order. On February 9, 2017, the Ninth Circuit upheld this TRO.

On March 6, 2017, President Trump revoked and replaced the First Executive Order with the Second Executive Order, which took effect on March 16, 2017. The Second Executive Order suspends entry for nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen to the United States for 90 days; bars entry to the United States for all refugees for 120 days; and lowers the number of refugees to be admitted in fiscal year 2017 to 50,000 refugees.

The Second Executive Order differs from the previous version in several respects:

a) Iraq is no longer among the designated countries affected by the travel ban;

b) it removes the indefinite exclusion of Syrian refugees;

c) it provides Customs and Border Protection with executive discretion to permit "case-by-case" admission of certain visa applicants or visa holders from the six countries (e.g., young children, students, those facing a medical emergency, those seeking to visit family, those who would suffer undue hardship if denied, and those who have previously established significant contacts with the United States. *See* Order, Section 3(c)); and

d) it cites to factual examples of individuals convicted or suspected of terrorism-related offenses.

Plaintiffs-Appellees filed this action on February 7, 2017, challenging the provisions of the First Executive Order as it related to refugees. Plaintiffs amended their complaint and moved to enjoin the Second Executive Order on March 10, 2017.[3] On March 16, 2017, the U.S. District Court for the District of Maryland issued an order in the present case enjoining Section 2(c) of the Second Executive Order, which creates a 90-day suspension of entry to the United States for nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen, because it violates the

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[3] On March 15, 2017, the U.S. District Court for the District of Hawaii temporarily enjoined Sections 2 and 6 of the Second Executive Order, finding that Plaintiffs had demonstrated sufficient likelihood of success on their claim that the Order violates the Establishment Clause, because the Order is intended to favor one religious denomination over another. *See* Order Granting TRO, *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017).

Establishment Clause of the U.S. Constitution and is beyond the President's authority with respect to immigrant visas under Section 1182 of the INA, 8 U.S.C. § 1182. The Government's appeal of that order is now before this Court.

ARGUMENT

I. THE SECOND EXECUTIVE ORDER IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

While the Executive and Legislative branches have broad powers to regulate immigration, those powers are not without bounds. *Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753 (1972). The Supreme Court has recognized a "limited judicial responsibility under the Constitution" to review Congressional actions concerning "the admission and exclusion of aliens." *Fiallo*, 430 U.S. at 794 n.5; *see Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) (per curiam) ("[N]either the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution."). At the very least, immigration regulations should be based on "facially legitimate and bona fide" reasons. *Kleindienst*, 408 U.S. at 769.

The Executive and Legislative branches may craft immigration policies that differentiate amongst particular groups; however, they cannot act without a rational relationship to a legitimate government purpose. *See Flores*, 507 U.S. at 306 (despite Congressional authority over immigration, "INS regulation must still . . .

rationally advanc[e] some legitimate governmental purpose"). Moreover, circumstances may give rise to a need for the courts to examine whether the Government's purpose is legitimate. *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) ("[A]n affirmative showing of bad faith" on the part of the government actor can lead courts to "look behind" the Government's facially neutral reason to deny admission to a non-resident alien); *I.N.S. v. Pangilinan*, 486 U.S. 875, 886 (1988) (analyzing whether Filipino nationals had received "unequal treatment . . . motivated by" discrimination).

Here, the Second Executive Order is not rationally related to its stated purpose of ensuring national security, nor is it based on "facially legitimate and bona fide" reasons, as required by *Flores* and *Kleindienst*. Indeed, the Second Executive Order's reliance on vague evidence and focus on countries from which no terrorist attacks on the United States have originated demonstrates that it fails the facial legitimacy test set forth in *Kleindienst*.

A. The Second Executive Order Does Not Further Its Stated Purpose.

As AJC has publically stated, the Second Executive Order "[does] not effectively address the legitimate security threats we face."[4] The Second Executive Order cites only two specific cases of terrorism-related offenses: two Iraqi refugees

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4 AJC, *AJC Statement on Revised Executive Order* (Mar. 6, 2017), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=14987411.

convicted for terrorism-related offenses in 2013 and a Somalian refugee convicted for attempted terrorism in 2014. The first case involves individuals from Iraq, a country that is no longer subject to a travel ban under the Second Executive Order. The remaining single case of one Somalian refugee in no way shows that the United States would be safer with an executive order blocking travel from six majority-Muslim nations and barring all refugees. Indeed, as a joint declaration in opposition to the First Executive Order—signed by ten prominent national security officials ranging across different U.S. government administrations—noted, "not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order." States' Resp. to Emergency Mot. Under Cir. R. 27-3 For Admin. Stay and Mot. for Stay Pending Appeal ("States' Response"), at Ex. A ¶ 4, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017).

The Second Executive Order also states that "since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States," and "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation." These general statistics about foreign-born crime rates and individuals under FBI investigation also do not supply a rational basis for the Second Executive Order. The Second Executive Order does not state how many of the "hundreds of persons" convicted of terrorism-related crimes were nationals from the six banned countries, and government officials have declined to disclose whether the described FBI investigations related to these nations have actually proved fruitful in identifying connections to terrorist activity. Indeed, given that the Trump Administration drafted the Second Executive Order specifically to survive judicial scrutiny, its limited factual support is particularly problematic. *See* Order Granting TRO at 39, *Hawaii v. Trump*, No. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017) ("The Court's conclusion rests on . . . the dearth of evidence indicating a national security purpose." (quoting *Aziz v. Trump*, No. 117CV116 LMB TCB, 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017))).

Even the current administration's Department of Homeland Security ("DHS") has noted that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." *See* Dep't of Homeland Sec., *Citizenship Likely an Unreliable Indicator of Terrorist Threat to the United States* (photo. reprint Feb. 2017) (n.d.).[5] Of the 82 terrorism-related offenses in the United States since March 2011, more than half of perpetrators were native-born U.S. citizens, and foreign-born perpetrators were from 26 different countries. *Id.* The seven countries with the most perpetrators were: Pakistan (5); Somalia (3); and Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan (2)—a very different list than that named in either the First or

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[5] *See* Nora Ellingsen, *Leaked DHS Report Contradicts White House Claims on Travel Ban*, Lawfare, Feb. 27, 2017, www.lawfareblog.com/leaked-dhs-report-contradicts-white-house-claims-travel-ban.

Second Executive Orders. *Id.* Moreover, the Government has failed to offer any additional national security evidence, even *in camera*, that there is a prospective threat from the nationals of the countries listed in the Second Executive Order. This absence of evidence illustrates that national security is not the underlying rationale for the Second Executive Order. The fact that homegrown terrorism remains a more prevalent threat to the United States than foreign terrorism, coupled with the fact that in the past six years fewer than two foreign-born individuals from each of Iran, Libya, Sudan, Syria, and Yemen have engaged in terrorism-related offenses, undermines a finding that excluding individuals from these countries is rationally related to national security concerns.

Further, nowhere does the Government explain how permitting an entry ban to apply even to the most vulnerable groups, including the elderly and young children, will make America more secure. Although the Second Executive Order allows for the "case by case" admission of some vulnerable individuals, members of these groups can, and inevitably will, still be excluded. Moreover, the Second Executive Order does not explain how this "case by case" review will proceed, or even the factors that will be relevant to such determinations. The Second Executive Order lacks sufficient detail to provide Customs and Border Protection officers guidance on how to apply such discretion in a manner that rationally advances some legitimate governmental purpose as set forth in *Flores*.

Rather than protecting the United States, the Second Executive Order may be detrimental to U.S. national security. The Second Executive Order has the potential to endanger U.S. troops and intelligence sources, "disrupt key counterterrorism, foreign policy, and national security partnerships," feed into the Islamic State of Iraq and the Levant ("ISIL")[6] propaganda "[which] portray[s] the United States as at war with Islam," disrupt law enforcement efforts, harm victims of terrorism, and result in negative economic consequences for the American people. States' Response at Ex. A ¶5, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017). As the lower court correctly noted, Defendants "have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history." Mem. Op. at 40, ECF No. 149.

B. The Second Executive Order Satisfies Only a Disparaging Campaign Promise, Further Undermining a Finding That the Second Executive Order is Rationally Related to Its Stated Purpose.

When a court finds that the Government acts with the purpose and effect of engaging in actions that "disparage and . . . injure" a group of people, it is less likely that their stated policies are rationally related to legitimate government purposes. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). Further, when

[6] ISIL is also known as ISIS—the Islamic State in Iraq and Syria or the Islamic State of Iraq and al-Sham.

an "affirmative showing of bad faith" is made, courts can "look behind" the Government's exclusion of a non-resident alien "for additional factual details beyond what its express" reasoning is. *Kerry*, 135 S. Ct. at 2141.

Here, the Second Executive Order is merely the fulfillment of a campaign promise, and is not based on sufficient national security concerns; therefore, it is even less likely to be rationally related to legitimate government purposes. Indeed, the public record suggests that the Second Executive Order is intended to fulfill President Trump's campaign rhetoric, in which he advocated for a "Muslim ban."[7] "[T]he fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order" highlights that the primary purpose of the Second Executive Order is to follow through on campaign rhetoric. Mem. Op. at 36, ECF No. 149.

For this reason, the courts assessing the First and Second Executive Orders properly found this inquiry necessary; they looked behind the Government's professed reasons to the "highly particular 'sequence of events' leading to this specific Executive Order and the dearth of evidence indicating a national security purpose." *Aziz*, 2017 WL 580855, at *9; *see also Washington v. Trump*, 847 F.3d at 1166 ("Moreover, in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings."); Order Granting Mot. to Convert TRO to Prelim. Inj., at 16-18, *Hawaii v. Trump*, Case No. 17-00050 DKW-KSC (D. Haw. Mar. 29, 2017) ("This Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has.").

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[7] President Trump has called the Second Executive Order a "watered-down version" of the original order, adding: "I think we ought to go back to the first one and go all the way." *See* Matt Zapotosky, Kalani Takase & Maria Sacchetti, *Federal judge in Hawaii freezes President Trump's new entry ban*, Wash. Post, Mar. 16, 2017, www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.cf7d2d96 44f9.

This inquiry is especially appropriate for the Second Executive Order because the modifications to the Second Executive Order amount to nothing more than "window dressing"—a transparent attempt to shoehorn a problematic campaign promise into a legal package. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (finding that voluntary cessation does not moot a case, especially in the face of openly announced intent to reenact an unconstitutional ordinance).

In fact, senior White House policy advisor Stephen Miller publically stated, "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court."[8] *See also* Order Granting TRO at 35, *Hawaii v. Trump*, Case No. 17-00050 DKW-KSC (D. Haw. Mar. 15, 2017). For the above reasons, and those further set forth in the record, the purpose and effect of the Second Executive Order is to act upon disparaging campaign rhetoric; it is not rationally related to legitimate government purposes.

C. Prior Rational U.S. Immigration Policies Further Demonstrate that the Second Executive Order is Not Rationally Related to a Legitimate Government Purpose.

Consistent with notions of human dignity, as well as principles of self-determination and religious freedom that are core to American democracy, the United States Executive and Legislative branches have rationally and lawfully used their immigration authority to welcome oppressed peoples. In stark contrast to the Second Executive Order, these immigration laws and policies were rationally related to their stated purpose and further demonstrate that the Second Executive Order does not satisfy this test.

The United States has historically welcomed groups of persecuted refugees. In 1979, the United States provided sanctuary to 111,000 Vietnamese refugees who were escaping economic hardship and the threat of torturous "re-education" camps following the Vietnam War. The next year, that number almost doubled to 207,000 refugees. Around the same time, the United States accepted over 120,000 Cuban refugees fleeing persecution from the Castro regime.[9] More recently, in 1999, the United States agreed to take in 20,000 refugees from Kosovo.[10]

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[8] Callum Borchers, *Stephen Miller went on Fox News. Now a Federal Court Says It Cannot "Pretend it has Not Seen What it Has"*, Wash. Post, Mar. 30, 2017, www.washingtonpost.com/news/the-fix/wp/2017/03/09/stephen-millers-fox-news-interview-is-coming-back-to-haunt-president-trump/?utm_term=.9a1952f1aa08.

The Executive branch has often established rational policies designed to assist groups in need, including through the use of Presidential Determinations on Refugee Admissions, which can increase admissions and funds for refugees based on humanitarian needs.[11] Yet another example is President George H.W. Bush's Executive Order 12,711, "Policy Implementation with Respect to Nationals of the People's Republic of China," which created a four-year deferral of deportation of

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[9] *See generally* Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times, Sept. 10, 2015, www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html?_r=1.

[10] Adam Taylor, *That time the United States happily airlifted thousands of Muslim refugees out of Europe*, Wash. Post, Nov. 17, 2015, www.washingtonpost.com/news/worldviews/wp/2015/11/17/that-time-the-united-states-happily-airlifted-thousands-of-muslim-refugees-out-of-europe/?utm_term=.7cd5cd88608d.

[11] *See, e.g.*, Presidential Determination No. 2016-13, 81 Fed. Reg. 70,315 (Sept. 28, 2016) (permitting the admission of up to 110,000 refugees to the United States in 2017, allocated based on special humanitarian concern and geographic regions, and specifically providing that individuals in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, and El Salvador could be considered refugees); Presidential Determination No. 99-23, 64 Fed. Reg. 28,085 (May 18, 1999) (allowing 20,000 Kosovar refugees to be admitted and providing $15 million in funds for relief); Presidential Determination No. 80-11, 45 Fed. Reg. 8539 (Jan. 28, 1980) (in response to "urgent humanitarian needs," determining that Afghan refugees were eligible for assistance under the Act).

Chinese nationals in response to the Tiananmen Square incident. 55 Fed. Reg. 13,897 (Apr. 11, 1990). In each of these instances, the Executive branch crafted rational policies tailored specifically to assist a group in need.

Similarly, Congress has rationally enacted immigration legislation in favor of specific groups to extend protections to oppressed communities. This was the case with the Lautenberg Amendment, which classified Soviet Jews and certain other religious communities as persecuted groups, automatically qualifying them for refugee status.[12]

In contrast to the Second Executive Order, each of the examples listed above did not involve the mere execution of campaign promises to exclude certain groups of people.[13] Instead, they were carefully designed to effectuate a particular result, and demonstrate how the Executive and Legislative branches have rationally used their immigration and foreign affairs authority for the legitimate purpose of

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12 This amendment facilitated entry into the United States for Soviet refugees just before the collapse of the Soviet Union. *See, e.g.*, AJC, *AJC Mourns Passing of Senator Lautenberg* (June 3, 2013), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=13164165.

13 Moreover, exclusionary policies can be rationally related to legitimate government purposes. *See, e.g.*, *Narenji v. Civiletti*, 617 F.2d 745, 747-48 (D.C. Cir. 1979) (affidavit from the Attorney General cites sufficient rational foreign affairs basis—*i.e.*, a response to the Iranian seizure of the American embassy—to draw distinctions based on nationality). However, unlike *Narenji*, here the Government has not offered similar evidence of a link between a specific major foreign affairs crisis and the Second Executive Order.

protecting oppressed groups. Accordingly, each helps demonstrate that the Second Executive Order cannot withstand constitutional scrutiny.

II. THE EXECUTIVE LACKS SUFFICIENT AUTHORITY TO ISSUE THE SECOND EXECUTIVE ORDER IN THE FACE OF THE INA.

The Executive Branch receives its authority over immigration from Congress, and the Executive is bound by these restrictions. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The President's power is at its highest ebb when there is an express or implied delegation of authority from Congress;[14] in a "zone of twilight" with concurrent authority when Congress is silent or ambiguous upon a given issue; and at its lowest when Congress's express or implied will is incompatible with Presidential action. *Zivotofsky*, 135 S. Ct. at 2084 (citing *Youngstown*, 343 U.S. at 635-38).

Here, the Executive's authority to issue the Second Executive Order is undermined by Section 1152(a)(1)(A) of the INA, 8 U.S.C. § 1152(a)(1)(A), which states that "[e]xcept as specifically provided in paragraph (2) and in Sections 1101(a)(27), 1141(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." *See* 8 U.S.C. §§ 1101(a)(27), 1141(b)(2)(A)(i), & 1153. This section of the INA was enacted to reject the shameful legacies of previous eras, in which immigration policy operated on a "national origins system" that explicitly sought to maintain a certain "ethnic composition of the American people." H. Rep. No. 89-745 (1965); S. Rep No. 89-748 (1965). AJC was a vital part of this movement to abolish the national origins system,[15] and has campaigned vigorously against discriminatory national origin quotas since that time.

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[14] Of course, the Legislative branch cannot delegate to the Executive authority to violate the Constitution. *See* Mem. Op. at 37, ECF No. 149 ("[T]he power of the Executive and Legislative branches to create immigration law remains 'subject to important constitutional limitations.'" (citing *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001))).

The Executive branch claims here that it may still discriminate under a 1954 INA provision allowing for Executive discretion, which states that:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

This claim, however, conflicts with the clear intent of Congress, as well as the text and structure of the statute. The 1965 discrimination ban was passed 11 years after the 1954 provision for Executive discretion. Congress undoubtedly knew the contents of the INA when it amended it, and would have intended for this amendment to apply to the INA as it existed at the time — including Section 1182(f). This accords with traditional principles of statutory construction, under which a provision enacted later in time governs one enacted earlier. U.S. Gov't Accountability Off., GAO-14-163SP, *Principles of Federal Appropriations Law: Annual Update of the Third Edition* 2-12 (Mar. 13, 2014). Thus, Section 1152(a)(1)(A) restricts Section 1182(f) — not vice versa.

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[15] Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906-1966* (1972); Marianne R. Sanua, *Let US Prove Strong: The American Jewish Committee 1945-2006* (2007).

Furthermore, Congress carefully considered exceptions to this bar on discrimination, and specifically wrote them into the statute. Section 1182(f) is not one of these exceptions, and is therefore not applicable here. *See* Mem. Op. at 22, ECF No. 149.

The Government also argues that Section 1152(a)(1)(B) allows for such discrimination. On the contrary, Section 1152(a)(1)(B) allows "the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." Some commentators have argued that State Department determinations under this provision are unreviewable.[16] Even if true, such procedural discretion does not permit the ban on nationalities, regions, or religions set forth in the Second Executive Order.

Additionally, the Government cites 8 U.S.C. § 1187(a)(12) in support of the Second Executive Order. This provision merely indicates that certain countries are ineligible for the visa waiver program ("VWP"). The Government, however, claims that this provision indicates that such countries have been "previously identified" as "warrant[ing] additional scrutiny in connection with our immigration policies." Second Executive Order, § 1(b)(iv)(d). However, 8 U.S.C. § 1187(a)(12) does not provide the Executive with the authority to suspend immigrant and non-immigrant visas and entry as set forth in the Second Executive Order.

Accordingly, in the face of the INA, the Executive lacks the authority to issue the Second Executive Order.

CONCLUSION

While the President enjoys broad authority to set immigration policy, that authority is necessarily constrained by the Constitution. Here, the Second Executive Order lacks any rational basis or bona fide government purpose, and cannot survive even the most basic constitutional scrutiny. To protect civil and

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16 *See* Josh Blackman, *The Legality of the 3/16/17 Executive Order, Part I: The Statutory and Separation of Powers Analyses*, Lawfare (Mar. 11, 2017), www.lawfareblog.com/legality-3617-executive-order-part-i-statutory-and-separation-powers-analyses.

religious freedoms and support an inclusive America that welcomes immigrants and refugees, AJC joins IRAP in seeking to affirm the injunction against the Second Executive Order.

Dated: Washington, D.C.
April 19, 2017

Respectfully submitted,

By: /s/ Adam S. Lurie

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1351 **Caption:** Int'l Refugee Assistance Project, et al. v. Trump, et al.

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(s) Adam S. Lurie

Party Name Amicus Curiae AJC

Dated: 4/19/2017

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No. 17-1351 Caption: Int'l Refugee Assistance Project, et al. v. Trump, et al.

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(name of party/amicus)

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Signature: /s/ Adam S. Lurie Date: April 19, 2017

Counsel for: American Jewish Committee

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I certify that on April 19, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

April 19, 2017
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I certify that on April 19, 2017, the foregoing was filed using the Court's CM/ECF system. All participants in the case that are registered users will be served electronically via that system. Service on parties not registered through CM/ECF will be made via Overnight Courier (Federal Express) at the address listed below:

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Dated: Washington, D.C.
April 19, 2017

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